

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Your Home Improvements Ltd

Of: 78 Southill Road, Parkstone, Poole, Dorset, BH12 3AS

1. The Information Commissioner ("the Commissioner") has decided to issue Your Home Improvements Ltd ("YHIL") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. YHIL, whose registered office is given above (Companies House Registration Number: 11028090) is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.
4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls

promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
- (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls

being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited (“TPS”) is a limited company which operates the register on the Commissioner’s behalf. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
8. Section 122(5) of the Data Protection Act 2018 “DPA18” defines direct marketing as “the communication (by whatever means) of any advertising material which is directed to particular individuals”. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
9. Consent in PECR is defined, from 29 March 2019, by reference to the concept of consent in Regulation 2016/679 (“the GDPR”): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the

GDPR sets out the following definition: *“consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.*

10. “Individual” is defined in regulation 2(1) of PECR as “a living individual and includes an unincorporated body of such individuals”.
11. A “subscriber” is defined in regulation 2(1) of PECR as “a person who is a party to a contract with a provider of public electronic communications services for the supply of such services”.
12. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR), as variously amended states the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

“(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.”

13. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
14. PECR implements Directive 2002/58/EC, and Directive 2009/136/EC which amended the earlier Directive. Both the Directive and PECR are “*designed to protect the privacy of electronic communications users*”: *Leave.EU & Eldon Insurance Services v Information Commissioner* [2021] UKUT 26 (AAC) at paragraph 26. The Commissioner seeks to interpret and apply PECR in a manner consistent with the purpose of the Directive and PECR of ensuring a high level of protection of the privacy of individuals, and in particular the protections provided from receiving unsolicited direct marketing communications which the individual has not consented to receive.
15. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

16. YHIL first came to the attention of the Commissioner in August 2020 when complaints about unsolicited marketing calls from a specific calling line identifier (“CLI”) were identified from the monthly reports received from the Telephone Preference Service (“TPS”).

17. The Commissioner looked into these complaints as part of a wider investigation into growing complaints from individuals about unsolicited marketing in relation to white goods maintenance and warranty products. The complaints in this case related to boiler cover.
18. The Commissioner made enquiries with the relevant Communications Service Provider ("CSP") which confirmed that the CLI in question had been allocated to YHIL. They provided detailed call records for the period between 1 June 2020 and 31 July 2020 which showed that, over that time period, YHIL had made 2,476 calls, of which 1,718 were made to individual subscribers whose number had been registered with the TPS for not less than 28 days. The Commissioner was able to establish that there had been 4 complaints made regarding calls from CLI's attributed to YHIL via the Telephone Preference Service ("TPS").
19. The following are examples of the complaints received by the TPS:
 - *"Said I had boiler insurance with them for five years (which I definitely do not, and never have had). Very persistent in demanding my bank account and sort code to verify who I was. Even offered to take over my laptop remotely to stake (sic) me through it."*
 - *"Saying my Boiler cover was due to expire. I don't have boiler cover with anyone.. I have received several of these calls. They are inconvenient and have an old credit card number of mine. And they know one of my passwords. (now changed)."*

- *"Said it was about my boiler cover.. Have receiver (sic) quite a few calls from this number over the last few weeks. Told them today to take my number off their books."*
 - *"Each time they have called, it has been a caller with an Asian accent. Have requested several times to remove our number from list. Reminded them today that as we have requested for our number to be removed, by law they have to do this. Also informed them that our number is registered on the opt out database and they shouldn't be calling us anyway. Names given : XXXX and XXXX."*
20. The Commissioner sent an initial investigation letter to YHIL on 28 August 2020, setting out her concerns with YHIL's PECR compliance and asking for details of call volumes and evidence of consent, amongst other information. Copy of the complaints were attached.
21. On the same day the Commissioner received a telephone call from YHIL's director querying why the letter had been sent. He explained that YHIL did not make outbound calls and had not made a sale since he purchased the business in 2018. He initially declined to respond to the Commissioner's enquiries however, telephoned again later that day to ask where he might locate the information required. He was informed that he should already hold it in his companies records. The director went on to say that he may have information to suggest that the calls were made from the Philippines and so he was asked to provide this evidence. The director also stated that since the government imposed lockdown in March 2020 his staff had been making calls from mobile numbers.

22. A written response to the Commissioner's initial investigation letter was provided by YHIL on 28 August 2020. This explained that the current director had purchased the business in 2018 with the understanding that it was a self-sustainable business with an existing customer base, and so he had never obtained new customers. The letter indicated that sometimes YHIL did receive calls from individuals who believed that had been called by the company, however it was assumed that they had either contacted the wrong company or were customers of a company with a similar name.
23. On 3 September 2020 the Commissioner sought further information from YHIL in respect of its website, the source of YHIL's data prior to purchase of the business in 2018, including opt-in information and privacy policies, any due diligence carried out in relation to data providers and consent, any company suppression process and confirmation as to any data sharing by YHIL with other companies.
24. On 22 September 2020 the Commissioner received contact from solicitors acting on behalf of YHIL. A meeting was held on 25 September 2020 whereby the Commissioner explained the basis of the investigation and reiterating the information she required. This was followed up by a written request on the same day.
25. A response was received on 29 September 2020 which stated:
"Mr XXXX [director] would like to make clear that he has not at any stage given authority to any third parties to make marketing calls on behalf of Your Home Improvements Ltd and neither did he make the calls personally. He is unable to offer an explanation for the provenance of the calls, other than the telephone records you have already seen."

He does not conduct marketing for this business and neither does he hold client contact lists that would enable him to do so. Given this, Mr XXXX has not sought consent to make marketing calls."

26. Neither YHIL nor its solicitors confirmed whether YHIL shares its data with any other business.
27. An end of investigation letter was sent by the Commissioner to YHIL on 5 October 2020.
28. The Commissioner is satisfied, based on evidence from complainants, that the YHIL calls were all made for the purposes of direct marketing as defined by section 122(5) DPA 18.
29. The Commissioner has made the above findings of fact on the balance of probabilities.
30. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by YHIL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

31. The Commissioner finds that YHIL contravened regulation 21 of PECR.
32. The Commissioner finds that the contravention was as follows:
33. Between 1 June 2020 and 31 July 2020, YHIL used a public telecommunications service for the purposes of making 1,718 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a

number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR. This resulted in 4 complaints being made to the TPS and the Commissioner.

34. The Commissioner is also satisfied for the purposes of regulation 21 that these 1,718 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and they had not given their prior consent to YHIL to receive calls.
35. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

36. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by YHIL arising from the organisation's activities over a two month period, and this led to a substantial number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a number of complaints being made as a result. Furthermore, YHIL has been unable to provide any explanation for the calls nor demonstrate it held valid consent for the purpose of these calls.
37. The percentage of calls made to TPS registered individuals is significant – in this case 69% of all the calls made.
38. This investigation was undertaken during a wider operation to combat targeting of vulnerable individuals by organisations selling white goods

maintenance and warranty products. The risk of detriment to individuals who are targeted in this way is high, as demonstrated by the complaints received.

39. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

40. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that YHIL's actions which constituted that contravention were deliberate actions (even if YHIL did not actually intend thereby to contravene PECR).
41. The Commissioner does not consider that YHIL deliberately set out to contravene PECR in this instance.
42. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
43. Firstly, she has considered whether YHIL knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met.
44. YHIL's director purchased the business in 2018 with an existing customer base and so should have been aware that contraventions of this type may occur.
45. The Commissioner has published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR.

This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.

46. Standard practice of the TPS is to contact the organisation making the calls on each occasion a complaint is made. It is therefore reasonable to believe that YHIL would have received a notification from the TPS for each of the complaints being made in this case which should have made YHIL aware of the risk that such contraventions may occur, and were indeed occurring.
47. It is therefore reasonable to suppose that YHIL should have been aware of its responsibilities in this area.
48. Secondly, the Commissioner has gone on to consider whether YHIL failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
49. YHIL could not evidence that it carried out any or any adequate due diligence upon purchase of the business, and seemingly took no steps to ascertain the source of the data utilised or ensure that it had consent to make the calls. It neglected to ensure that the data had been screened against the TPS every 28 days as required. These are basic requirements for any organisations conducting a live direct marketing campaign. The director is unable to provide any explanation for the calls which would suggest a general lack of awareness of how the business is operating.

50. Reasonable steps in these circumstances may have included familiarising itself with the relevant legislation surrounding direct marketing, ensuring that it could evidence that individuals had specifically consented to receiving calls from YHIL; screening the data it intended to rely on against the TPS register itself, and ensuring an effective suppression system was in place for individuals who did not wish to be contacted.
51. It is clear that YHIL failed to take those reasonable steps.
52. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to impose a monetary penalty

53. The Commissioner has taken into account the following **aggravating features** of this case:
 - Whilst there was no evidence of direct targeting of vulnerable individuals, the Commissioner noted that complainants mentioned persistence of calls for products which they had never had, in one instance going so far as offering to take control over a laptop remotely. It is also concerning that complaints evidence that YHIL were seeking financial information including sort codes and account numbers which, given the company's approach, poses a high risk of inadvertent disclosure or fraud;
 - The actions of YHIL were carried out to generate business and to increase profits, gaining an unfair advantage on those businesses complying with the PECR;

- The Commissioner produces clear guidance via its website on the rules of direct marketing. She also operates a helpline should organisations be unsure and require further clarification. The Commissioner has previously taken openly publicised regulatory action against other organisations within the same sector and it is therefore reasonable to expect informed awareness of PECR within the industry in which YHIL operate;
 - YHIL failed to co-operate with the Commissioner's investigation, initially declining to do so until the prospect of being served with an Information Notice. Even then, and despite having utilised the services of a solicitor, YHIL was unable to provide adequate answers to the Commissioner's enquiries or evidence consent to make the calls;
 - YHIL's director acknowledged that calls were made by staff using mobile telephones, however the ICO is unable to verify the extent to which such calls were made. Therefore the true extent of the contravention is indeterminable.
54. The Commissioner considers that there are no mitigating factors to consider in this case.
55. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
56. This has included issuing a Notice of Intent on 19 July 2021, in which the Commissioner set out her preliminary thinking, and invited YHIL to make representations in response.

57. Whilst YHIL acknowledged receipt of the Notice of Intent, it has not made any representations to the Commissioner.
58. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
59. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty. She has decided that a monetary penalty is an appropriate and proportionate response to the finding of a serious contravention of Regulation 21 of PECR by YHIL.
60. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only telephoning consumers who want to receive these calls.
61. The Commissioner has also considered the likely impact of a monetary penalty on YHIL on the basis of the information available to her, and in the absence of any financial representations from YHIL.

The amount of the penalty

62. Taking into account all of the above, the Commissioner has decided that the amount of the penalty is **£20,000 (Twenty thousand pounds)**.

Conclusion

63. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **19 October 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
64. If the Commissioner receives full payment of the monetary penalty by **18 October 2021** the Commissioner will reduce the monetary penalty by 20% to **£16,000 (Sixteen thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
65. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- a) the imposition of the monetary penalty and/or;
 - b) the amount of the penalty specified in the monetary penalty notice.
66. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
67. Information about appeals is set out in Annex 1.
68. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- period for appealing against the monetary penalty and any variation of it has expired.

69. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 20th day of September 2021

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or

 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963
Email: grc@justice.gov.uk

a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

a) your name and address/name and address of your representative (if any);

b) an address where documents may be sent or delivered to you;

c) the name and address of the Information Commissioner;

d) details of the decision to which the proceedings relate;

e) the result that you are seeking;

f) the grounds on which you rely;

g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;

h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of

time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).